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# APPENDIX A

SUPREME COURT OF CALIFORNIA

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No. S163681.

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COUNTY OF SANTA CLARA *et al.*,
*Petitioners*,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
*Respondent*;

ATLANTIC RICHFIELD COMPANY *et al.*,
*Real Parties in Interest.*

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July 26, 2010.

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GEORGE, C.J.

A group of public entities composed of various California counties and cities (collectively referred to as the public entities) are prosecuting a public-nuisance action against numerous businesses that manufactured lead paint (collectively referred to as defendants). The public entities are represented both by their own government attorneys and by several private law firms. The private law firms are retained by the public entities on a contingent-fee basis. After summary judgment was granted in favor of defendants on various tort causes of action initially advanced by the public entities, the complaint eventually was amended to leave the public-nuisance action as the sole claim, and abatement as the sole remedy.

Defendants moved to bar the public entities from compensating their privately retained counsel by means of contingent fees. The superior court, relying upon this court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), ordered the public entities barred from compensating their private counsel by means of any contingent-fee agreement, reasoning that under *Clancy*, all attorneys prosecuting public-nuisance actions must be "absolutely neutral." The superior court concluded that *Clancy* therefore precluded any arrangement in which private counsel has a financial stake in the outcome of a case brought on behalf of the public. On petition of the public entities seeking a writ of mandate, the Court of Appeal held that *Clancy* does not bar *all* contingent-fee agreements with private counsel in public-nuisance abatement actions, but only those in which private attorneys appear *in place of*, rather than *with and under the supervision of*, government attorneys.

We must decide whether the Court of Appeal correctly construed our opinion in *Clancy*, or if that case instead broadly prohibits all contingent-fee agreements between public entities and private counsel in any public-nuisance action prosecuted on behalf of the public. *Clancy* arguably supports defendants' position favoring a bright-line rule barring any attorney with a financial interest in the outcome of a case from representing the interests of the public in a public-nuisance abatement action. As set forth below, however, a reexamination of our opinion in *Clancy* suggests that our decision in that case should be narrowed, in recognition of both (1) the wide array of public-nuisance actions (and the corresponding diversity in the types of interests implicated by various prosecutions), and (2) the different means by which

prosecutorial duties may be delegated to private attorneys without compromising either the integrity of the prosecution or the public's faith in the judicial process.

I

The procedural history of this case is not in dispute. The public entities' claims against defendants originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300, 40 Cal.Rptr.3d 313 (*Santa Clara*).) The superior court granted defendants' motion for summary judgment on all causes of action. The Court of Appeal reversed the superior court's judgment of dismissal and ordered the lower court to reinstate the public-nuisance, negligence, strict liability, and fraud causes of action. (*Id.* at p. 333, 40 Cal.Rptr.3d 313.) Thereafter, the public entities filed a fourth amended complaint that alleged a single cause of action, for public nuisance, and sought only abatement. Throughout this litigation,

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[1] The plaintiffs in this case are County of Santa Clara (Santa Clara), County of San Mateo (San Mateo), County of Monterey (Monterey), County of Solano (Solano), County of Los Angeles, County of Alameda (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles, and City of San Diego (San Diego).

As a result of corporate acquisition and merger, the names of the defendants in the action below are Atlantic Richfield Company, Millennium Inorganic Chemicals, Inc., Millennium Holdings LLC, American Cyanamid Company, ConAgra Grocery Products Company, E.I. du Pont de Nemours and Company, NL Industries, Inc., Sherwin-Williams Company, The O'Brien Corporation, and Does Nos. 1-50, inclusive.

the public entities have been represented both by their government counsel and by private counsel.

Upon remand following *Santa Clara*, *supra*, 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313, defendants filed a "motion to bar payment of contingent fees to private attorneys," asserting that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." Defendants sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

Defendants attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations of their government attorneys and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, other than $150,000 that would be forwarded by Santa Clara to cover initial costs, private counsel would incur all further costs and would not receive any legal fees unless the action were successful. If the action succeeded, private counsel would be entitled to recover any unreimbursed costs from the "recovery" and a fee of 17 percent of the "net recovery."

Some of the contingent-fee agreements in the present case specify the respective authority of both private counsel and public counsel to control the conduct of the pending litigation. The fee agreements between private counsel and San Francisco, Santa Clara, Alameda, Monterey, and San Diego explicitly provide that the public entities' government counsel "retain final authority over all aspects of the

Litigation."[2] Private counsel for those five public entities submitted declarations confirming that their clients' government counsel retain "complete control" over the litigation.[3] The two remaining fee agreements contained in the record—those involving Solano and Oakland—purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." During proceedings in the trial court, Oakland disclaimed this fee agreement and asserted that its government counsel had retained "complete control" of the litigation and intended to revise the agreement to reflect this circumstance.[4]

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[2] Four of these five public entities submitted declarations of government counsel stating that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco's submission declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

[3] Private counsel Cotchett, Pitre & McCarthy submitted a declaration in which it stated it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. This law firm asserted that these public entities' government counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation, and that San Francisco's city attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

[4] Oakland submitted a declaration by one of its deputy city attorneys stating that "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public

Solano's private counsel asserts that its public counsel have "maintained and continue[s] to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." The record before us does not contain the fee agreements between the three other public-entity petitioners and their respective private counsel.[5]

The various fee agreements provide different definitions of "recovery." Some of the agreements define the term "recovery" as "moneys other than civil penalties," whereas others define this term as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include the phrase "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or . . . the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the

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nuisance cause of action in this case as it relates to the interests of the People of the City of Oakland." Oakland asserted it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

[5] Seven separate fee agreements between the various public entities and their private counsel were before the lower courts and are part of the record before this court. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego. The record does not contain the fee agreements between private counsel and San Mateo, County of Los Angeles, and City of Los Angeles, respectively, although these three entities are and remain plaintiffs in the underlying case and petitioners here.

Santa Clara County Counsel agrees to seek, as part of any such settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard defendants' motion "to bar payment" as well as the public entities' motion for leave to file a fourth amended complaint. The court granted the public entities' motion and ordered that the pleading be filed within 30 days.

Although some preliminary issues were raised concerning the ripeness of defendants' motion, the superior court resolved the motion on its merits. The court rejected the public entities' claim that *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347, was distinguishable, concluding instead that under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted defendants' motion and entered an order "preclud[ing] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." But the court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

The public entities sought a writ of mandate in the Court of Appeal. After issuing an order to show cause, the appellate court ultimately set aside the superior court's ruling and issued a writ commanding the lower court to (1) set aside its order granting defendants' motion, and (2) enter a new order denying defendants' motion. Although acknowledging that *Clancy* purported to bar the participation of private

counsel on a contingent-fee basis in public-nuisance abatement lawsuits brought in the name of a public entity, the Court of Appeal held that the rule set forth in *Clancy* is not categorical and does not bar the fee agreements made in the present case, because those agreements specified that the government attorneys would maintain full control over the litigation. The appellate court, briefly noting that the suit being prosecuted did not seek to impose criminal liability or infringe upon fundamental constitutional rights, reasoned that the circumstance that the private attorneys are being supervised by public lawyers vitiates any concern regarding the neutrality of outside counsel. We granted defendants' petition for review.

II

A

We begin our inquiry with this court's decision in *Clancy*. In that case, the City of Corona (Corona) hired James Clancy, a private attorney, to bring nuisance abatement actions against a business (the Book Store), which sold adult materials. (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The hiring of Clancy followed several attempts by Corona to terminate the operations of this establishment. Specifically, several months after the Book Store opened, Corona adopted two ordinances that purported to regulate adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in Corona. (*Ibid.*) After the owner of the Book Store, Helen Ebel, filed an action in federal court, the United States Court of Appeals for the Ninth Circuit ultimately held both ordinances to be unconstitutional. (*Ebel v. City of Corona* (9th Cir. 1985) 767 F.2d 635.)

Corona subsequently retained the services of Clancy to abate nuisances under the authority of a new ordinance, proposed on the same day Clancy was hired and seemingly targeted specifically at the Book Store. (*Clancy*, *supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The ordinance defined a public nuisance as "'[a]ny and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . . .'" (*Ibid.*) The employment contract between Corona and Clancy, who was an independent contractor rather than an employee (*id.* at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347), provided that he was to be paid $60 per hour for his work in bringing public-nuisance actions, except that he would be paid only $30 per hour for his work in any public-nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover attorney fees. (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

Two weeks after the public-nuisance ordinance was enacted, Corona passed a resolution declaring the Book Store to be a public nuisance and revoking its business license. Thereafter, Corona and Clancy (as the city's "'special attorney'") filed a complaint against Ebel, her son Thomas Ebel, another individual, and the Book Store, seeking abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.)[6] The Ebels unsuccessfully attempted to disqualify

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[6] During proceedings instituted to quash a subpoena issued after the filing of the lawsuit, the court allowed Corona to amend its complaint to substitute the term "City Attorney of Corona" as Clancy's title. (*Clancy*, *supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) Clancy appeared in the action in place of, and with no supervision by, Corona's city attorney.

*Clancy* as the attorney for Corona. (*Clancy*, at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The Ebels then sought writ relief, contending it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance," and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Id.* at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) This court generally agreed, finding the arrangement between Corona and Clancy "inappropriate under the circumstances." (*Id.* at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.)

We observe as a threshold matter that our decision to disqualify Clancy from representing Corona in the public-nuisance action was founded not upon any specific statutory provision or rule governing the conduct of attorneys, but rather upon the courts' general authority "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, *supra*, 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) Invoking that authority, this court stated that it "may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the Ebels." (*Ibid.*)

We concluded that for purposes of evaluating the propriety of a contingent-fee agreement between a public entity and a private attorney, the neutrality rules applicable to criminal prosecutors were equally applicable to government attorneys prosecuting certain civil cases. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-747, 218 Cal.Rptr. 24, 705 P.2d 347.) Accordingly, our decision set forth the responsibilities associated with the prosecution of a criminal case, noting that a prosecutor does not represent merely an ordinary party to a controversy, but instead is the representative of a

"'"sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."'" (*Clancy*, *supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347; see *People v. Superior Court* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr. 476, 561 P.2d 1164 (*Greer*).) We noted that a prosecutor's duty of neutrality stems from two fundamental aspects of his or her employment. As a representative of the government, a prosecutor must act with the impartiality required of those who govern. Moreover, because a prosecutor has as a resource the vast power of the government, he or she must refrain from abusing that power by failing to act evenhandedly. (*Clancy*, *supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) With these principles in mind, we declared that not only is a government lawyer's neutrality "essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole." (*Ibid.*)

Recognizing that a city attorney is a public official, we noted that "the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Thus, pursuant to the American Bar Association's then Model Code of Professional Responsibility, a lawyer who is a public officer "'should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.'" (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting former ABA Model Code Prof. Responsibility, EC 8-8.) "'[An] attorney holding public office should avoid all conduct which might lead the layman

to conclude that the attorney is utilizing his public position to further his professional success or personal interests.'" (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting ABA Com. on Prof. Ethics, opn. No. 192 (1939).) Notably, we held that because public lawyers handling noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public prosecutors, "there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

We further held that public-nuisance abatement actions belong to the class of civil cases in which counsel representing the government must be absolutely neutral. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) We came to this conclusion by analogizing a public-nuisance abatement action to an eminent domain action—a type of proceeding in which we already had concluded that government attorneys must be unaffected by personal interest. (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347, citing *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

We explained: "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public

has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) Moreover, "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Ibid.*)

We concluded that James Clancy—although he was an independent contractor and not an employee of the City of Corona—nonetheless was subject to the same neutrality guidelines applicable to Corona's public lawyers, because "a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, *supra*, 39 Cal.3d at p. 747, 218 Cal. Rptr. 24, 705 P.2d 347.)

Finally, we held that because Clancy's hourly rate would double in the event Corona were successful in the litigation against the Ebels and the Book Store, it was evident that Clancy had an interest extraneous to his official function in the actions he was prosecuting on behalf of Corona. Accordingly, "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet

when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) We expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Id.* at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

Importantly, we also noted that "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) As an example of such a permissible instance of representation, we cited *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580, 140 P.2d 392, a case in which we had approved a contingent-fee arrangement between the City of Huntington Beach and a law firm hired to represent it in all matters relating to protection of the city's oil rights. Thus, we recognized that contingent-fee arrangements in ordinary civil cases generally are permitted. (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

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As is evident from the preceding discussion, our decision in *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal. Rptr. 24, 705 P.2d 347, was guided, in large part, by the circumstance that the public-nuisance action pursued by Corona implicated interests akin to those inherent in a criminal prosecution. In light of this similarity, we found it appropriate to invoke directly the disqualification rules applicable to criminal prosecutors-rules that categorically bar contingent-fee

agreements in all instances. As we observed in *Clancy*, contingent-fee "contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Nonetheless, we noted it is generally accepted that any type of arrangement conditioning a public prosecutor's remuneration upon the outcome of a case is widely condemned. (*Ibid.*, citing ABA Stds. for Criminal Justice, Prosecution Function, com. to former Std. 2.3(e) ["'it is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly'"].)

Accordingly, although there are virtually no cases considering the propriety of compensation of public prosecutors pursuant to a contingent-fee arrangement, it would appear that under most, if not all, circumstances, such a method of compensation would be categorically barred. This is so because giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting "would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Greer*, *supra*, 19 Cal.3d at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164 [explaining that disqualification was required in order to protect the defendant's fundamental due process right not to be deprived of liberty without a fair trial, and to enforce the prosecutor's obligation "to respect this mandate"].)[7]

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[7] It also seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the

Our opinion in *Clancy* recognized that the interests invoked in that case were akin to the vital interests implicated in a criminal prosecution, and thus invocation of the disqualification rules applicable to criminal prosecutors was justified. And if those rules are found to be equally applicable in the case now before us, disqualification of the private attorneys hired to assist the public entities similarly would be required.

As explained below, however, to the extent our decision in *Clancy* suggested that public-nuisance prosecutions always invoke the same constitutional and institutional interests present in a criminal case, our analysis was unnecessarily broad and failed to take into account the wide spectrum of cases that fall within the public-nuisance rubric. In the present case, both the types of remedies sought and the types of interests implicated differ significantly from those involved in *Clancy* and, accordingly, invocation of the strict rules requiring the automatic disqualification of criminal prosecutors is unwarranted.

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private attorney's compensation on the outcome of the criminal prosecution. (See *State of Rhode Island v. Lead Industries Assn., Inc.* (R.I. 2008) 951 A.2d 428, 475, fn. 48 (*State of Rhode Island*) [explicitly refraining from allowing contingent-fee arrangement in the criminal context, because the court was "unable to envision a criminal case where contingent fees would ever be appropriate—even if they were not explicitly barred, as is the case in this jurisdiction"]; cf. *People v. Eubanks* (1996) 14 Cal.4th 580, 596, 598, 59 Cal.Rptr.2d 200, 927 P.2d 310 [finding cognizable conflict of interest because of the circumstance that the corporate crime victim paid the "'substantial'" debts and expenses incurred by the district attorney investigating the case, and that such payment evidenced a " 'reasonable possibility' the prosecutor might not exercise his discretionary functions in an evenhanded manner"].)

The broad spectrum of public-nuisance law may implicate both civil and criminal liability.[8] Indeed, public-nuisance actions vary widely, as evidenced by Penal Code section 370, which broadly defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway. . . ."[9]

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[8] As explained by the authors of a recent law review article, public nuisance law over the course of its development has become increasingly more civil in nature than criminal. The precepts of public-nuisance law migrated to colonial America from the English common law virtually unchanged, and at that time were primarily criminal. (Faulk and Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation* (2007) 2007 Mich. St. L.Rev. 941, 951 (Faulk and Gray).) Eventually, however, violation of public-nuisance law came to be considered as a tort, and its criminal enforcement was invoked much less frequently. As state legislators began to enact statutes prohibiting particular conduct and setting specific criminal penalties for such conduct, there was little need for the broad and somewhat vague crime of nuisance. (*Ibid.*; Rest.2d Torts, § 821B, com. c, p. 88.)

[9] From its earliest incarnation in the common law, public-nuisance law proscribed an "interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection." (Rest.2d Torts § 821B, com. b, p. 88; see also Faulk and Gray, *supra*, 2007 Mich. St. L.Rev. at p. 951; Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 U. Cin. L.Rev. 741, 790-791, 794.)

Although in *Clancy* we spoke generally of a "balancing of interests" and a "delicate weighing of values" (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347), our concerns regarding neutrality, fairness, and a possible abuse of the judicial process by an interested party appear to have been highly influenced by the circumstances of the case then before us—a long-running attempt by the City of Corona to shut down a single adult bookstore. As set forth above, when Corona's first attempts at legislating the bookstore out of business were ruled unconstitutional, it hired a private attorney with a personal and pecuniary interest in the case to file a nuisance action against the bookstore pursuant to a newly enacted ordinance that clearly was intended to specifically target that business.

The history of Corona's efforts to shut down the bookstore revealed a profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants-whose vital property rights were threatened. Under California law, the continued operation of an established, lawful business is subject to heightened protections. (*See Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529, 8 Cal.Rptr.2d 385 [continued operation of 35-year business that was making recent substantial improvements was recognized as a vested right]; *Livingston Rock & Gravel Co. v. County of L.A.* (1954) 43 Cal.2d 121, 127, 272 P.2d 4 [noting that businesses generally cannot be immediately terminated due to nonconformance with rezoning ordinances, because of the "hardship and doubtful constitutionality" of such discontinuance].) It was in this factual setting that we noted that the abatement of a public nuisance involves a "balancing of interests. On the one hand is the

interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

The case also implicated both the defendants' and the public's constitutional free-speech rights. As we recognized in *Clancy*, the operation of the adult bookstore involved speech that arguably was protected in part, and thus curtailment of the right to disseminate the books in question could significantly infringe upon the Ebels' liberty interest in free speech. Again, our focus upon the critical "balancing of interests" was guided by the circumstance that Corona was attempting to abate a public nuisance created by an adult bookstore—thus adding something more "to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal. Rptr. 24, 705 P.2d 347.)[10]

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[10] Moreover, we also found it significant that "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

As we explained, public-nuisance "actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen.Code, § 372.) 'A public or common nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . . As in the case of other crimes, the normal remedy is in the hands of the state.'" (*Clancy*, *supra*, 39

It is evident that the nature of the particular nuisance action involved in *Clancy* was an important factor in leading us to conclude the rules governing the disqualification of criminal prosecutors properly should be invoked to disqualify James Clancy.[11] The direct application of those rules was warranted because the public-nuisance abatement action at issue implicated important constitutional concerns, threatened ongoing business activity, and carried the threat of criminal liability. In light of these interests, the case required the same "balancing of interests" and "delicate weighing of values" on the part of the

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Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted, quoting Prosser and Keeton, The Law of Torts (5th ed. 1984) p. 618.)

[11] The disqualification of public prosecutors is governed by Penal Code section 1424, which provides that a motion to recuse a prosecutor "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1); see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, 76 Cal.Rptr.3d 250, 182 P.3d 579 (*Haraguchi*) [noting that Pen.Code, § 1424 " 'articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" "].)

Although Penal Code section 1424 does not, by its terms, govern the conduct of civil government attorneys, we held in *Clancy* that certain government attorneys—because of the nature of the action they are prosecuting—must, like a criminal prosecutor, be free of any conflict of interest that might compromise a fair trial for the defendant. Although we did not invoke section 1424 in *Clancy* and instead analyzed the case under principles of neutrality—by considering whether an attorney's extraneous interest in a case would prejudice a defendant-the rule we applied unquestionably was derived from, and was substantially similar to, the conflict-of-interest rule applicable to criminal prosecutors. (See *Haraguchi*, *supra*, 43 Cal.4th at p. 711, 76 Cal.Rptr.3d 250, 182 P.3d 579.)

government's attorney prosecuting the case as would be required in a criminal prosecution. Because of this strong correlation, the disqualification of a private attorney with a pecuniary interest in the outcome of the case was mandated.

The public-nuisance action in the present case, by contrast, involves a qualitatively different set of interests—interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution. We find this distinguishing circumstance to be dispositive. As set forth above, neutrality is a critical concern in criminal prosecutions because of the important constitutional liberty interests at stake. On the other hand, in ordinary civil cases, we do not require neutrality when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests. Indeed, as discussed above, we specifically observed in *Clancy* that the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case. Thus, for example, public entities may employ private counsel on such a basis to litigate a tort action involving damage to government property, or to prosecute other actions in which the governmental entity's interests in the litigation are those of an ordinary party, rather than those of the public. (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

The present case falls between these two extremes on the spectrum of neutrality required of a government attorney. The present matter is not an "ordinary" civil case in that the public entities' attorneys are appearing as representatives of the public and not as counsel for the government acting

as an ordinary party in a civil controversy. A public-nuisance abatement action must be prosecuted by a governmental entity and may not be initiated by a private party unless the nuisance is personally injurious to that private party. (Civ.Code, § 3493 ["A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise"]; *id.*, § 3494 ["[a] public nuisance may be abated by any public body or officer authorized thereto by law"].) There can be no question, therefore, that the present case is being prosecuted on behalf of the public, and that accordingly the concerns we identified in *Clancy* as being inherent in a public prosecution are, indeed, implicated in the case now before us.

Yet, neither are the interests affected in this case similar in character to those invoked by a criminal prosecution or the nuisance action in *Clancy*. Although the remedy for the successful prosecution of the present case is unclear, we can confidently deduce what the remedy will *not be*. This case will not result in an injunction that prevents the defendants from continuing their current business operations. The challenged conduct (the production and distribution of lead paint) has been illegal since 1978. Accordingly, whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech. Finally, because the challenged conduct has long since ceased, the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants.

The adjudication of this action will involve at least some balancing of interests, such as the social utility of defendants' product against the harm it has caused, and may implicate the free-speech rights exercised by defendants when they marketed their products and petitioned the government to oppose regulations. Nevertheless, that balancing process and those constitutional rights involve only past acts—not ongoing marketing, petitioning, or property/business interests. Instead, the trial court will be asked to determine whether defendants should be held liable for creating a nuisance and, if so, how the nuisance should be abated. This case will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves. The expenditure of resources to abate a hazardous substance affecting the environment is the type of remedy one might find in an ordinary civil case and does not threaten the continued operation of an existing business.

Of course, because this is a public-nuisance action, and the public entities are not merely pursuing abatement on government property but on private property located within their jurisdictions, defendants' potential exposure may be very substantial. The possibility of such a substantial judgment, however, does not affect the type of fundamental rights implicated in criminal prosecutions or in *Clancy*, *supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347. There is no indication that the contingent-fee arrangements in the present case have created a danger of governmental overreaching or economic coercion. Defendants are large corporations with access to abundant monetary and legal resources. Accordingly, the concern we

expressed in *Clancy* about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case.

Thus, because—in contrast to the situation in *Clancy*—neither a liberty interest nor the right of an existing business to continued operation is threatened by the present prosecution, this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution. The role played in the current setting both by the government attorneys and by the private attorneys differs significantly from that played by the private attorney in *Clancy*. Accordingly, the absolute prohibition on contingent-fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted in the circumstances of the present civil public-nuisance action.[12]

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[12] Nor is the applicable standard that which governs the disqualification of judges and other adjudicators. It is well established that the disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys. (*People v. Freeman* (2010) 47 Cal.4th 993, 996, 103 Cal.Rptr.3d 723, 222 P.3d 177 [holding that for purposes of judicial disqualification, the constitutional standard is whether ""the probability of actual bias on the part of the judge or decisionmaker . . . is too high to be constitutionally tolerable"" (citing *Caperton v. A.T. Massey Coal Co., Inc.* (2009)—U.S.—[129 S.Ct. 2252, 173 L.Ed.2d 1208]; Code Civ. Proc. § 170.1 [setting forth statutory grounds for disqualification of judges]; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 243 [100 S.Ct. 1610, 64 L.Ed.2d 182] [noting that "the strict requirements of *Tumey* [*v. Ohio* (1927)] 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] and *Ward* [*v. Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267] are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge"].)

C

Nevertheless, as set forth above, because the public-nuisance abatement action is being prosecuted on behalf of the public, the attorneys prosecuting this action, although not subject to the same stringent conflict-of-interest rules governing the conduct of criminal prosecutors or adjudicators, are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public-standards that would not be invoked in an ordinary civil case.

The underlying principle that guided our decision in *Clancy* was that a civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public-nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347; see also *Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164 [a prosecuting attorney ""'is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or by an interested individual'"" (italics omitted)]; *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545 [a "'government lawyer in a civil action . . . should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results'"].) Indeed, it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done. (*Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164.)

These principles of heightened neutrality remain valid and necessary in the context of the situation presented by the case before us. A fair prosecution and outcome in a proceeding brought in the name of the public is a matter of vital concern both for defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper motivation on the part of attorneys representing the government. Accordingly, to ensure that an attorney representing the government acts evenhandedly and does not abuse the unique power entrusted in him or her in that capacity—and that public confidence in the integrity of the judicial system is not thereby undermined—a heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

We must determine whether this heightened standard of neutrality is compromised by the hiring of contingent-fee counsel to assist government attorneys in the prosecution of a public-nuisance abatement action of the type involved in the present proceedings. For the reasons that follow, we conclude that this standard is not compromised. Because private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest. This conflict, however, does not necessarily mandate disqualification in public-nuisance cases when fundamental constitutional rights and the right to continue operation of an existing business are not

implicated. Instead, retention of private counsel on a contingent-fee basis is permissible in such cases if neutral, conflict-free government attorneys retain the power to control and supervise the litigation. As explained below, because public counsel are themselves neutral, and because these neutral attorneys retain control over critical discretionary decisions involved in the litigation, the heightened standard of neutrality is maintained and the integrity of the government's position is safeguarded. Thus, in a case where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business, concerns about neutrality are assuaged if the litigation is controlled by neutral attorneys, even if some of the attorneys involved in the case in a subsidiary role have a conflict of interest that might-if present in a public attorney-mandate disqualification.

This reasoning recently was embraced by the Supreme Court of Rhode Island, which approved the state attorney general's employment of private counsel on a contingent-fee basis to prosecute public-nuisance abatement actions against lead paint manufacturers-a case identical in all material respects to the underlying action here. (*State of Rhode Island, supra*, 951 A.2d 428.) That court considered the propriety of the contingent-fee agreements in light of the state attorney general's status as a public servant, and his attendant responsibility to seek justice rather than prevail at all costs. (*Id.* at p. 472.) The state high court noted that the attorney general was bound by the ethical standards governing the conduct of public prosecutors. (*Ibid.*) Ultimately, citing the underlying decision of the Court of Appeal in the present case, the court in *State of Rhode Island* concluded that "there is nothing unconstitutional or illegal or

inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable. However, due to the special duty of attorneys general to 'seek justice' and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations . . . . [I]t is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into." (*State of Rhode Island*, at p. 475, original italics, boldface and fns. omitted.)

We generally agree with the Supreme Court of Rhode Island and the Court of Appeal in the present case that there is a critical distinction between an employment arrangement that fully delegates governmental authority to a private party possessing a personal interest in the case, and an arrangement specifying that private counsel remain subject to the supervision and control of government attorneys. Private counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification. Accordingly, in a case in which private counsel are subject to the supervision and control of government attorneys, the discretionary

decisions vital to an impartial prosecution are made by neutral attorneys and the prosecution may proceed with the assistance of private counsel, even though the latter have a pecuniary interest in the case.

It is true that the public attorneys' decisionmaking conceivably could be influenced by their professional reliance upon the private attorneys' expertise and a concomitant sense of obligation to those attorneys to ensure that they receive payment for their many hours of work on the case. This circumstance may fairly be viewed as being somewhat akin to having a personal interest in the case. Nevertheless, this is not the type of personal conflict of interest that requires disqualification of the public attorneys. As this court has stated: "'"[A]lmost any fee arrangement between attorney and client may give rise to a conflict . . . The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest."'" (*People v. Doolin* (2009) 45 Cal.4th 390, 416, 87 Cal.Rptr.3d 209, 198 P.3d 11.)[13]

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[13] In furtherance of their contention that the retention of private counsel on a contingent-fee basis is impermissible in public-nuisance-abatement actions because such financial arrangements create a sense of obligation toward private counsel on the part of public counsel, defendants and their amici cite to our discussion of the obligation incurred by a criminal prosecutor toward the victim who provided substantial financial assistance to the district attorney's office in *People v. Eubanks*, *supra*, 14 Cal.4th 580, 59 Cal.Rptr.2d 200, 927 P.2d 310, in which we held that the financial arrangement resulted in a

disqualifying conflict of interest on behalf of the public prosecutor. (*Id.* at p. 596, 59 Cal.Rptr.2d 200, 927 P.2d 310.) This reliance upon *Eubanks* is misplaced.

As a threshold matter, as we explained above, public-nuisance-abatement actions that do not implicate fundamental constitutional rights or threaten the operation of an existing business do not invoke the same concerns regarding neutrality as those present in a criminal prosecution, and therefore attorneys pursuing such claims are not subject to the strict disqualification rules applicable to criminal prosecutors that we invoked to disqualify the public attorneys in *Eubanks*. Moreover, even under the disqualification standard applied in *Eubanks*, the retention of private counsel on a contingent-fee basis in public-nuisance actions is distinguishable from the financial arrangement we found impermissible in that case. In *Eubanks*, *supra*, we reasoned that because criminal defendants have "no right to expect that crimes should go unpunished for lack of public funds," the mere fact that the victim's financial assistance enables the prosecutor to proceed further or more quickly "would not, by itself, constitute unfair treatment." (14 Cal.4th at p. 599, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Instead, a disabling conflict is established "in this factual context[ ] only by a showing that the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party." (*Ibid*; see also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 836, 118 Cal.Rptr.2d 725, 44 P.3d 102 [recusal is not required simply because victim pays for expense the district attorney's office otherwise would have incurred].) Applying that reasoning to the retention of contingent-fee counsel by public entities pursuing public-nuisance-abatement actions, it is evident that individuals and business entities that create public nuisances similarly have no right to expect that abatement actions will not be brought "for lack of public funds." Thus, the mere circumstance that contingent-fee counsel enable public attorneys to prosecute the case does not, by itself, constitute unfair treatment.

Nor are the financial contributions of private counsel of a nature or magnitude likely to put the public attorneys' discretionary decisionmaking within the influence or control of an

As recognized by the American Bar Association, attorneys are expected to resolve conflicts between their personal interests and their ethical and professional responsibilities "through the exercise of sensitive professionalism and moral judgment." (ABA Model Rules Prof. Conduct, Preamble, par. 9.) In other words, attorneys are presumed to comport themselves with ethical integrity and to abide by all rules of profes-

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interested party. Unlike the financial assistance provided by the victim in *Eubanks*—a party with a strong personal interest in the outcome of the case and an expectation that the provision of financial assistance would incentivize the public attorneys to pursue the victim's desired outcome even if justice demanded a contrary course of action—the financial assistance in a public-nuisance case pursued with the assistance of contingent-fee counsel is provided by a group of sophisticated legal experts who have calculated the financial risk against the possible reward, and who are charged with the knowledge that public counsel's obligation to place justice above their desire to win a case may result in governmental decisions that do not maximize monetary recovery for the private attorneys.

This factual distinction is especially important in light of the specific contractual provisions we discuss *supra*. As we explain below, to ensure that the heightened standard of neutrality is maintained in the prosecution of a public-nuisance-abatement action, contingent-fee agreements between public entities and private counsel must contain specific provisions delineating the proper division of responsibility between the public and private attorneys. Specifically, those contractual provisions must provide explicitly that all critical discretionary decisions will be made by public attorneys—most notably, any decision regarding the ultimate disposition of the case. These contractual provisions reinforce the principle that the financial assistance provided by contingent-fee counsel is conditioned on the understanding that public counsel will retain full control over the litigation and, in exercising that control, must and will place their duty to serve the public interest in ensuring a fair and just proceeding above their sense of any obligation to maximize a monetary recovery for the private attorneys.

sional conduct. In light of the supervisory role played by government counsel in the litigation—and their inherent duty to serve the public's interest in any type of prosecution pursued on behalf of the public—we presume that government attorneys will honor their obligation to place the interests of their client above the personal, pecuniary interest of the subordinate private counsel they have hired.

As we have explained above, in the type of public-nuisance abatement action being prosecuted in the present case, disqualification of counsel need not be governed by the stringent disqualification rules applicable to criminal prosecutors. Nevertheless, the role of the prosecutor provides useful guidance concerning the type of discretionary decisions that must remain with neutral government attorneys to ensure that the litigation is conducted in a conflict-free manner. A public prosecutor "has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian*, *supra*, 27 Cal.4th at p. 840, 118 Cal. Rptr.2d 725, 44 P.3d 102.) In *Greer*, we emphasized that it is "because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer*, *supra*, 19 Cal.3d at pp. 266-267, 137 Cal.Rptr. 476, 561 P.2d 1164.) Accordingly, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality." (*Id.* at p. 267, 137

Cal.Rptr. 476, 561 P.2d 1164; see also *Hambarian*, *supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102 [holding that proper test for a disqualifying conflict of interest under Pen.Code section § 1424 is whether "the prosecutor's *discretionary decision-making* has been placed within the influence or control of an interested party"].)

A prosecutor's authority to make critical discretionary decisions in criminal cases is vital to ensuring the neutrality we require of attorneys entrusted with that position. This is so because such discretionary decisions provide the greatest opportunity to abuse the judicial process by placing personal gain above the interests of the public in a fair and just prosecution and outcome. For the same reason, in the context of public-nuisance abatement proceedings, critical discretionary decisions similarly may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys.

Accordingly, although the principles of heightened neutrality do not categorically bar the retention of contingent-fee counsel to assist public entities in the prosecution of public-nuisance abatement actions, those principles do mandate that all critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel—in other words, neutral government attorneys must retain and exercise the requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case. Such control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize

their monetary reward. Accordingly, when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of government attorneys prosecuting the case on behalf of the public has been maintained.

Defendants assert that even if the control of private counsel by government attorneys is viable in theory, it fails in application because private counsel in such cases are hired based upon their expertise and experience, and therefore always will assume a primary and controlling role in guiding the course of the litigation, rendering illusory the notion of government "control". To the extent defendants assert that no contractual provision delegating the division of responsibility will or can be adhered to, we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations.[14]

Defendants also contend that the concept of "control" is unworkable as a standard to govern future cases, because it will be difficult (if not impossible) for a

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[14] We also decline the suggestion of defendants and their amici curiae to view all contingent-fee agreements as inherently suspect because of an alleged "appearance of impropriety" created by such arrangements. Contingent-fee arrangements are deeply entrenched as a legitimate and sometimes prudent method of delegating risk in the context of civil litigation, and in the absence of evidence of wrongdoing or unethical conduct we decline to impugn this means of compensating counsel in the context of civil litigation.

trial court to monitor whether government counsel for a public entity is adequately fulfilling his or her supervisory role and controlling all important aspects of the litigation, including procedural tactics, the gathering and presentation of evidence, the consideration and resolution of settlement negotiations, and other discretionary matters. Defendants assert that short of egregious actions on the part of private counsel or the supervising government attorney, violations of the "control" exception would be difficult to detect.[15]

These practical concerns do not require the barring of contingent-fee arrangements in all public prosecutions. Instead, to ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel. retainer agreements providing for contingent-fee retention should encompass more than boilerplate language regarding "control" or "supervision," by identifying certain critical matters regarding the litigation that contingent-fee counsel must present to government attorneys for decision. The requisite specific provisions, described below, are not comprehensive panaceas and may not all operate perfectly in the context of every contingent-fee situation, but each of them will assist parties and the court in assessing whether private counsel are abusing their prosecutorial office. Moreover, adherence to these provisions is subject to objective verification

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[15] In the present case, the evidence of the public entities' control consists of the fee arrangements as well as the declarations submitted by the public entities and their private attorneys. (See *ante*, 112 Cal.Rptr.3d at pp. 703-705, and fns. 2, 3 & 4, 235 P.3d at pp. 26-28, and fns. 2, 3 & 4.) Defendants assert in their briefing that they further attempted to obtain discovery regarding the actual control being exercised by the public entities, but that those entities refused to disclose any such additional documents, citing the attorney-client privilege.

both by defendants and by the court without the need for engaging in discovery that might intrude upon the attorney-client privilege or attorney work product protections.

In a case such as the present one, in which any remedy will be primarily monetary in nature, the authority to settle the case involves a paramount discretionary decision and is an important factor in ensuring that defendants' constitutional right to a fair trial is not compromised by overzealous actions of an attorney with a pecuniary stake in the outcome. Accordingly, retention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys. Similarly, such agreements must specify that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel. (Cf. ABA Formal Ethics Opn. No. 06-443 (Aug. 5, 2006) ["Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization's inside counsel about the subject of the representation without obtaining the prior consent of the entity's outside counsel"].)[16]

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[16] The primacy of the discretionary authority to settle a case recently was invoked by a federal court in Ohio that considered Sherwin-Williams Company's challenge, on unspecified unconstitutional grounds, to the contingent-fee agreements between three Ohio cities and private counsel in a lead paint public-nuisance abatement action very similar to the underlying action in the present case. (*Sherwin-Williams Co. v. City of Columbus* (S.D.Ohio, July 18, 2007, No. C2-06-829) 2007 WL 2079774,

Additionally, we adopt, in slightly modified form, the specific guidelines set forth by the Supreme Court of Rhode Island in *State of Rhode Island*, *supra*, 951 A.2d at page 477, footnote 52. Specifically, contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

These specific provisions are not exhaustive. The unique circumstances of each prosecution may require a different set of guidelines for effective supervision

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2007 U.S. Dist. Lexis 51945.) The court originally had barred the private attorneys from providing legal representation, because "the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (2007 WL 2070774 at p. *1, 2007 U.S. Dist. Lexis 51945 at pp. *3-*4.) In a subsequent ruling, the court approved the two contingent-fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Id.* at p. *2, 2007 U.S. Dist. Lexis 51945 at p. *6.) The third agreement, however, still was deficient, because it provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.* at p. *3, 2007 U.S. Dist. Lexis 51945 at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingent-fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

and control of the case, and public entities may find it useful to specify other discretionary decisions that will remain vested in government attorneys. Nevertheless, the aforementioned provisions comprise the minimum requirements for a retention agreement between a public entity and private counsel adequate to ensure that critical governmental authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case.

III

In the present case, five of the seven contingent-fee agreements between the public entities and private counsel contained in the record provide that the public entities' government counsel "retain final authority over all aspects of the Litigation."[17] Declarations of public counsel for these five public entities confirm that these individuals "retained and continue to retain complete control of the litigation," have been "actively involved in and direct all decisions related to the litigation," and have "direct oversight over the work of outside counsel." Private counsel submitted declarations confirming that the government counsel for the five public entities retain "complete control" over the litigation.[18] The references in these agreements

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[17] These five agreements are those of San Francisco, Santa Clara, Alameda, Monterey, and San Diego.

[18] As noted above, Oakland and Solano County have submitted declarations of their public counsel asserting that government attorneys retain full "control" over all aspects of the litigation. Nonetheless, those two entities' fee agreements in the record do not reflect this arrangement, make no provision for the retention of "final authority over all aspects" of the litigation, and do not otherwise specify that the private attorneys are subject to the supervision of public counsel. As noted above, the

to "final authority over all aspects of the litigation" fairly can be read to mandate that the government attorneys will supervise the work of the private attorneys, and will retain authority to control all critical decisionmaking in the case. The declarations establish that such general control and supervision have been exercised and are, in fact, being exercised.

Nevertheless, although five of the 10 fee agreements between the respective public entities and private counsel contain language specifying that control and supervision will be retained by the government attorneys, none of the ten fee agreements in the present case contain the other specific provisions regarding retention of control and division of responsibility that we conclude are required to safeguard against abuse of the judicial process. Accordingly, because the seven agreements that are in the record are deficient under the standard we set forth above, and because we cannot assess the sufficiency of the three remaining agreements that are not contained in the record, we reverse the judgment rendered by the Court of Appeal and remand the matter for further proceedings consistent with this opinion. Assuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis, we conclude they may do so after revising the respective retention agreements to conform with the requirements set forth in this opinion.

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fee agreements for the County of Los Angeles, the City of Los Angeles, and San Mateo are not contained in the record before us.

WE CONCUR: KENNARD, CHIN, MORENO, JJ., and RICHMAN, J.*

Concurring opinion by WERDEGAR, J.

I concur in the judgment insofar as it vacates the superior court's order barring the plaintiff public entities from paying their private counsel under contingent fee agreements.

Although I do not agree with every aspect of the majority's reasoning, I do agree this court spoke too broadly in 1985 when it prohibited contingent fee agreements in all public nuisance cases. (See *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 748-750, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*).) As the majority explains, public nuisance cases comprise a wide range of factual situations, some of which do not necessarily entail a conflict of interest between public-entity plaintiffs and private attorneys retained under contingent fee agreements. To limit *Clancy* is thus appropriate, as the majority concludes.

In this case, however, at least a possible conflict of interest arises from the combination of two circumstances: The public entities assert they cannot afford to pay private counsel other than a contingent fee, and some of the fee agreements at issue give private counsel a share of the value of any abatement ordered by the court. Given the hypothetical choice between an abatement order of great public value and a less valuable cash settlement,[1] both the public

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* Associate Justice, Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] The government cannot recover damages in public nuisance cases. (*People ex rel. Van de Kamp v. American Art Enterprises,*

and the private attorneys have an incentive to advocate the less valuable cash settlement, as it provides funds from which private counsel can be paid without an appropriation of public money representing the private attorneys' share of the value of abatement. Certainly this incentive does not amount to a personal conflict of interest requiring the public attorneys' recusal, as the majority explains (maj. opn., *ante*, 112 Cal.Rptr.3d at p. 715, 235 P.3d at p. 36-37), but it does lead me to question whether public attorneys under all foreseeable circumstances will be able to exercise the independent supervisory judgment the majority concludes is essential if private counsel are to be retained under contingent fee agreements. Here, however, the parties' briefing on the subject of possible remedies is so vague, any such conflict is merely speculative.

In concurring in the judgment, I am also influenced by the concern that to grant defendants' motion might encourage parties in future cases to bring belated motions seeking to interfere with their opposing parties' attorney-client relationships for tactical reasons. Although plaintiffs commenced this action in 2000, and although defendants do not assert they learned of the contingent fee agreements only recently,[2] defendants did not challenge those agreements until 2007, after losing pretrial dispositive

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*Inc.* (1983) 33 Cal.3d 328, 333, fn. 11, 188 Cal.Rptr. 740, 656 P.2d 1170.)

[2] Plaintiff City and County of San Francisco's contingent fee agreement, for example, has been public knowledge since 2001, when the Board of Supervisors authorized the City Attorney to enter into it. (S.F. Res. No. 190-01, as amended Feb. 13, 2001.)

motions on appeal.[3] (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313.) In ruling on a motion to disqualify counsel, the court may properly consider the possibility that the motion is a tactical device (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971) and deny the motion when unreasonable delay has caused great prejudice (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 599-600, 283 Cal.Rptr. 732; *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1313, 234 Cal.Rptr. 33). To grant defendants' motion in this case could as a practical matter force plaintiffs to abandon their lawsuit after nearly a decade of pretrial litigation and discovery. While defendants have asked the court not to *disqualify* plaintiffs' counsel but instead simply to bar plaintiffs from *compensating* counsel on a contingent basis, the only authority for defendants' motion is the body of law concerning disqualification. Because there is evidence indicating that an order prohibiting contingent fees would as a practical matter preclude private counsel's participation—in effect disqualifying them—the rule requiring timely presentation of the motion would logically apply.

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[3] I recognize that until 2007 the complaint included additional causes of action that did not implicate contingent fee concerns, but this would not have precluded an earlier motion to prohibit contingent fee arrangements with respect to the public nuisance cause of action.

I CONCUR: RIVERA, J.*

* Associate Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

# APPENDIX B

COURT OF APPEAL,
SIXTH DISTRICT, CALIFORNIA.

No. H031540.

COUNTY OF SANTA CLARA *et al.*,
*Petitioners*,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
*Respondent*;

ATLANTIC RICHFIELD COMPANY *et al.*,
*Real Parties in Interest.*

April 8, 2008.
Review Granted July 23, 2008.

MIHARA, J.

A group of public entities are prosecuting a representative public nuisance action against a group of companies that manufactured lead paint. This action seeks abatement as the sole remedy, and it has not yet proceeded to trial. The companies filed a motion seeking to bar the public entities from compensating their private counsel by means of contingent fees. The superior court, relying on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*), issued an order barring the public entities from compensating their private counsel by means of any contingent fee agreement. The public entities seek writ relief from the superior

court's order. They assert that *Clancy* does not bar *all* contingent fee agreements in public nuisance abatement actions, and that *their* contingent fee agreements are valid. We conclude that *Clancy* does not bar the public entities' contingent fee agreements with their private counsel, and we issue a writ of mandate directing the superior court to vacate its order and issue a new order denying the companies' motion.

## I. Background

The public entities' action against the companies originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300, 40 Cal.Rptr.3d 313 (*Santa Clara I*).) In March 2006, this court reversed the superior court's judgment of dismissal and ordered the superior court to reinstate the representative public nuisance cause of action and the negligence, strict liability, and fraud causes of action. (*Santa Clara I*, at p. 333, 40 Cal.Rptr.3d 313.) In January 2007, the public entities filed a motion seeking leave to file a proposed fourth amended complaint that alleged a single representative public nuisance cause of action and sought only abatement. Throughout this litigation, the public entities have been represented by both their in-house counsel and private counsel.

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[1] The petitioners in this case are Santa Clara County (Santa Clara), San Mateo County (San Mateo), Monterey County (Monterey), Solano County (Solano), Los Angeles County (LA County), Alameda County (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles (LA City), and City of San Diego (San Diego).

In February 2007, the companies filed a "motion to bar payment of contingent fees to private attorneys." They asserted that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." The companies sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

The companies attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations from their in-house and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, other than $150,000 that would be forwarded by Santa Clara toward costs, private counsel would pay all further costs and would not receive any fees unless the action was successful. If the action succeeded, private counsel could seek a court award of costs and would be entitled to recover any unrecompensed costs from the "recovery" and a fee of 17% of the "net recovery."

The fee agreements provide different definitions of "recovery." Some of the agreements define "recovery" as "moneys other than civil penalties," while others define "recovery" as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or in the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement

provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the Santa Clara County Counsel agrees to seek, as part of any such settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard both the companies' motion "to bar payment" and the public entities' motion for leave to file the fourth amended complaint. The court granted the public entities' motion for leave to file the fourth amended complaint and ordered that the pleading be filed within 30 days.

Although there were some preliminary issues about the "ripe[ness]" of the companies' motion, the superior court resolved the motion on its merits.[2]

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[2] At the hearing, the superior court noted that it was "somewhat puzzled as to what a contingent fee would be based upon if you're not permitted to [re]cover damages. . . ." The court noted that attorney's fees were not available in this type of public nuisance abatement action. "The fact that . . . you may not recover damages for a public nuisance that may be abated seems to me would eliminate the-the necessity of having the value-of having a contingent fee agreement with counsel. . . ."

The public entities asserted that the motion was not "ripe" because it could not be predicted what type of remedy or fees would be available. Private counsel for the public entities asserted that "[i]f there is no recovery in this case from any monetary funds, the people who are going to suffer here are the folks who are assisting county counsel. We believe at this time since we have not had the benefit of analyzing what the remedies are going to be for this type of abatement we can't forecast that." "The risk truly is on private counsel. We may never see a nickel from the case."

The attorney for the companies admitted that, "[o]n the question of non ripeness," he was "confused about the common fund issue and where a contingency might come from." "Now if

The court rejected the public entities' claim that *Clancy* was distinguishable. The court concluded that, under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted the companies' motion and "preclud[ed] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation. . . ." The court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

The public entities sought a writ of mandate in this court, and the superior court stayed the matter pending resolution of this writ proceeding. This court issued an order to show cause on the writ petition, the companies filed a return, and the public entities filed a reply.[3]

## II. Discussion

The public entities claim that the superior court erred in categorically precluding contingent fee agreements. They maintain that *Clancy* does not categorically bar the retention of private counsel to represent a public entity in a public nuisance abatement action under a contingent fee agreement. The public entities contend that their engagement of

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the plaintiffs ultimately figure out a way to have a pot of money against which a seventeen percent contingency could apply," the contingency fee would be a "vast[ ]" amount of money.

[3] Numerous amicus curiae briefs have also been filed in this proceeding.

private counsel under contingent fee agreements in this action falls outside the scope of *Clancy*'s holding.

A. Propriety of Writ Review

In this case, the companies, for whatever reason, did not style their motion as a motion to *disqualify* the public entities' private counsel.[4] While an order *disqualifying* counsel is an *appealable* order (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 599, fn. 1, 168 Cal.Rptr. 196), the order issued by the superior court granting the companies' motion was not appealable because it did not explicitly disqualify the public entities' private counsel. Instead, it precluded the public entities from employing their private counsel *under any contingent fee arrangements*.

"It would be naive not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, 145 Cal.Rptr. 9, 576 P.2d 971.) In this case, the companies' motion threatened not only to deprive the public entities of their choice of counsel but also to preclude them from pursuing any appellate remedies. Writ review of this order is appropriate because appellate review is unavailable, and any error in the order would result in unjustifiably depriving the public entities of their right to counsel of choice.

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[4] The attorney for the companies asserted at the hearing on the motion that the companies "do not ask for disqualification" but only that "the paying of contingency fees be barred."

B. *Clancy*

We begin with *Clancy*, since *Clancy* was the basis for the superior court's ruling. In *Clancy*, the City of Corona (Corona) had hired James Clancy, a private attorney, to bring nuisance abatement actions against businesses selling obscene publications in violation of a city ordinance. (*Clancy*, *supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The employment contract between Corona and Clancy, who was an independent contractor rather than an employee, provided that Clancy was to be paid $60 per hour for his work in bringing public nuisance actions, but he would be paid only $30 per hour for his work in any public nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover its attorney's fees. (*Clancy*, at pp. 745, 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

Clancy, acting as a "special" City Attorney, filed a public nuisance complaint against a bookstore and its operator seeking abatement, a declaratory judgment and an injunction. (*Clancy*, *supra*, 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The bookstore operator unsuccessfully sought to disqualify Clancy as attorney for Corona. (*Ibid.*) The bookstore operator then sought writ relief, contending that it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance" and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Clancy*, at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

The California Supreme Court recognized that "there is a class of civil actions that demands the representative of the government to be absolutely

neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) "[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

The first question was whether a public nuisance abatement action fell within the class of civil cases in which the government's representative must be absolutely neutral. The court noted that ordinary civil cases brought by the government do not fall within this class of cases, and therefore contingent fee arrangements in ordinary civil cases are permitted.[5] (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) However, public nuisance abatement actions differ from ordinary civil actions brought by the government. "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is

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[5] "Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a[n ordinary] civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action [to which the absolute neutrality requirement applies], the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) Since public nuisance abatement actions generally involve "a delicate weighing of values" and "balancing of interests," such actions fall within the class of civil cases in which the government's representative must be absolutely neutral.

The next question was whether the need for the government's representative in a public nuisance abatement action to be absolutely neutral precluded Clancy from prosecuting Corona's public nuisance abatement action against the bookstore operator under the contingent fee arrangement. The court concluded that this contingent fee arrangement precluded Clancy from being absolutely neutral. "Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748, 218 Cal.Rptr. 24, 705 P.2d 347.) "[W]e hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy

disqualified from representing the City in the pending abatement action." (*Clancy*, at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) The court expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Clancy*, at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

C. Application of *Clancy*

As in *Clancy*, the public entities in this case have engaged the services of private counsel pursuant to contingent fee agreements under which private counsel will participate in representing the interests of the public entities in a public nuisance abatement action. The public entities argue that *Clancy*'s absolute neutrality requirement does not apply here because private counsel have *not* been engaged as the *sole* representatives of the public entities, as James Clancy was in *Clancy*, but only to *assist* the government attorneys who are prosecuting this action on behalf of the public entities. Unlike James Clancy, private counsel do not have decision-making authority and the power to control the litigation, both of which have been retained by the public entities' in-house counsel. The public entities claim that the limited and subordinate role of private counsel does not justify applying the absolute neutrality requirement to them.

It is undisputed that private counsel have been engaged to play a limited, subordinate role in this litigation. All of the public entities are represented by in-house counsel in addition to their private counsel. The fee agreements between five of the public entities and their private counsel explicitly provide that the public entities' in-house counsel "retain final

authority over all aspects of the Litigation."[6] Their private counsel submitted declarations confirming that the public entities' in-house counsel retain "complete control" of the litigation.[7] The two remaining fee agreements, those of Oakland and Solano, purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." However, Oakland has disclaimed this fee agreement and asserts that it has retained "complete control" of this litigation and is revising its fee agreement to so reflect.[8] Solano's private

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[6] Four of the public entities submitted declarations to the effect that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

[7] Private counsel Cotchett, Pitre & McCarthy (Cotchett) submitted a declaration in which it stated that it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. Cotchett asserted that the public entities' in-house counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation. They asserted that San Francisco's City Attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

[8] Oakland submitted a declaration by a city attorney that: "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public nuisance cause of action in this case as it relates to the interests of the People of the City of

counsel asserts that Solano's in-house counsel has "maintained and continue[s] to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." The record before us does not contain any fee agreements between the remaining three public entity petitioners and any private counsel.[9]

The public entities have therefore established that their private counsel serve in a subordinate role in which private counsel merely assist in-house counsel

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Oakland." Oakland asserted that it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

[9] Seven separate fee agreements between the various public entity petitioners and their private counsel were before the superior court and are before us. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego.

No fee agreements are before us involving LA City, LA County or San Mateo. LA City submitted a declaration below stating that it has not yet joined the litigation and has not retained private counsel, although it anticipates joining the litigation and needing the services of private counsel.

San Mateo did not submit a fee agreement, but it submitted a declaration by its in-house counsel in which in-house counsel asserted that it "has retained and continues to retain complete control of the litigation and retains final authority over all aspects of the litigation." The declaration stated that a fee agreement was attached, but no such attachment appears in petitioners' appendix of exhibits. However, Cotchett's declaration confirmed that it had been retained by San Mateo and that San Mateo retained "complete control over all aspects of the litigation" and "all decision making authority and responsibility."

Nothing in the record before us indicates that LA County has retained private counsel to represent it in this litigation or contemplates doing so.

and lack any authority to control the litigation. The only remaining question is whether the limited role of private counsel renders inapplicable *Clancy*'s absolute neutrality requirement. While *Clancy* contains language suggesting that it is establishing a broad rule banning contingent fee agreements with private counsel in public nuisance abatement actions, we are bound by only the *holding* in *Clancy*, not all of its language.

"We acknowledge, as we must, that we are bound to follow binding precedent of a higher court, and that the refusal to do so is in excess of our own jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 [20 Cal.Rptr. 321, 369 P.2d 937].) However, we are not bound by dicta. . . . In every case, it is necessary to read the language of an opinion in the light of its facts and the issues raised, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are dicta, with no force as precedent." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1300-1301, 77 Cal.Rptr.2d 296.)

"It is a foundational principle that: '"[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.'"

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157, 278 Cal.Rptr. 614, 805 P.2d 873.)

The California Supreme Court's holding in *Clancy* must be construed with reference to the facts presented in *Clancy*, and the binding authority of *Clancy* is limited to the facts upon which the California Supreme Court rested its holding. James Clancy was serving as Corona's *sole* representative in its public nuisance abatement action and had *complete control* over the litigation. *Clancy*'s holding was based on the rationale that, where private counsel are "performing tasks on behalf of and in the name of the government" in a public nuisance abatement action in which there must be a "balancing of interests," private counsel must be absolutely neutral and cannot be compensated by a contingent fee arrangement, because private counsel's financial interest might "tip the scale" on which these interests are balanced. (*Clancy*, *supra*, 39 Cal.3d at pp. 747, 748, 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

In contrast, where private counsel are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control*, private counsel are not *themselves* acting "in the name of the government" and have no role in the "balancing of interests" that triggers the absolute neutrality requirement. Private counsel serving in such a subordinate role do not supplant the public entities' in-house attorneys, who must be absolutely neutral, and are not in a position where their interest in maximizing their contingent fee can influence the balancing of interests or any of the other decisions that are made exclusively by the public entities' in-

house attorneys. Because *Clancy*'s holding is limited to the facts that were before the California Supreme Court in *Clancy*, a private attorney serving as the sole representative of the government in a public nuisance abatement action and completely controlling the litigation, *Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation.[10]

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[10] The concurring opinion posits that it is a "factual determination that must be made on a case-by-case basis" whether private counsel may assist in the representation of a public entity under a contingent fee agreement in a public nuisance case. This case is not an appropriate vehicle for us to opine on the precise nature of the decision that a superior court would be required to make in a case in which there were factual disputes regarding the nature of the fee agreement or the relationship between private counsel and a public entity.

The issue before us in this writ proceeding was presented to the superior court on undisputed facts and was resolved by the court as a pure question of law. Although it was undisputed that private counsel were engaged solely to assist in-house counsel in representing the public entities, with in-house counsel retaining complete control over the litigation, the superior court, relying solely on *Clancy*, ruled that contingent fee agreements between public entities and private counsel were categorically barred in public nuisance cases.

Because the superior court resolved the sole issue presented in this writ proceeding as a matter of law, and it is presented to us as a matter of law, this case does not present the issue that the concurring opinion purports to resolve. Whether, in a case in which there are disputed facts, a superior court primarily makes a factual determination or primarily exercises its discretion in deciding whether to permit private counsel to represent a public entity under a contingent fee agreement in a public nuisance action is a question not presented in this case. Resolution of that

## D. Other Cases

Since *Clancy* does not support the superior court's order, we must consider whether any other authority does.

None of the other cases cited by the companies provides any support for the superior court's order. In *Tumey v. State of Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (*Tumey*), Tumey was arrested for unlawful possession of alcohol and tried by the mayor of the village, who had the power to ascertain guilt and set the amount of the fine. The mayor would be paid $12 out of the fine if Tumey was convicted, but would receive no funds if Tumey was not convicted. (*Tumey*, at pp. 520, 523, 533, 47 S.Ct. 437.) The United States Supreme Court concluded that it was a violation of due process for the mayor to adjudge Tumey's culpability because the mayor had a pecuniary interest in the outcome. "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." (*Tumey*, at p. 521, 47 S.Ct. 437.) "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." (*Tumey*, at p. 523, 47 S.Ct. 437.) "It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of

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question must await a case in which it is presented and would necessarily require resolution of the appropriate standard of review for this court to exercise in such a case. As these issues are not before us here, we express no opinion on them.

his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his a[c]quittal." (*Tumey*, at p. 532, 47 S.Ct. 437.) Because *Tumey* was solely concerned with the financial interest of the *adjudicator*, it is not relevant to the financial interest of private counsel assisting in the *prosecution* of a proceeding. Private counsel here are not playing an adjudicative role in the proceedings.

*Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (*Ward*), like *Tumey*, found a due process violation where a mayor served as the adjudicator. The only difference between *Ward* and *Tumey* was that the mayor in *Ward* did not *personally* benefit from conviction, but had an interest in conviction because the fines funded the village's budget. In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (*Marshall*), the United States Supreme Court concluded that "that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge." (*Marshall*, at p. 243, 100 S.Ct. 1610.) Thus, the "strict requirements" of *Tumey* and *Ward* apply only to adjudicators, not to those who are functioning like prosecutors.

The public entities note that *Clancy* distinguished *Sedelbauer v. State* (1983) 455 N.E.2d 1159 (*Sedelbauer*). In a footnote responding to James Clancy's reliance on *Sedelbauer*, the California Supreme Court briefly noted that *Sedelbauer* "approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" (*Clancy, supra*, 39 Cal.3d at p. 749, fn. 3, 218 Cal.Rptr.

24, 705 P.2d 347.) In *Sedelbauer*, the Indiana appellate court found no error in the fact that a private attorney with a private interest in the suppression of pornography had served as cocounsel in a criminal obscenity prosecution and "appeared *with* a deputy prosecuting attorney, and not in place of the State's duly authorized counsel." (*Sedelbauer*, at p. 1164.) We agree with the public entities that *Clancy*'s treatment of *Sedelbauer* suggests that there is a critical distinction between a private attorney who *supplants* the public entity's "duly authorized counsel" and a private attorney who serves only in a *subordinate* role as "co-counsel" to the public entity's in-house counsel.

Two other cases relied on by the public entities also provide some support for their claim that absolute neutrality is not required of private counsel who are merely assisting in-house counsel and have no control over the litigation.

In *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230 (*Glendening*), the State of Maryland entered into a contingent fee agreement with private counsel to pursue a tort action against tobacco companies. Private counsel would be paid only out of a "money judgment," and there was no indication that the action would include a public nuisance abatement cause of action. (*Glendening*, at pp. 1231-1233.) The tobacco companies sought to invalidate the contingent fee agreement. The Maryland Court of Appeals distinguished *Clancy* in its ruling validating the agreement. "[N]o constitutional or criminal violations [are] directly implicated here, and, hence, there is no potential conflict of interest. Also, and more important, notably absent from *Clancy* is a legislative enactment authorizing the

'special employment' of outside counsel in 'extraordinary' cases. Equally important, is the absence of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable.' [Citation.] These, we believe, are significant material distinctions which permit a finding that the instant contingency fee contract is not violative of due process or public policy." (*Glendening,* at pp. 1242-1243.) Although *Glendening* was not a public nuisance abatement action, the fact that it distinguished *Clancy* in part on the ground that control would be exercised by the state rather than by private counsel supports our conclusion that absolute neutrality is not required of private counsel here.

In *City and County of San Francisco v. Philip Morris, Inc.* (N.D.Cal.1997) 957 F.Supp. 1130 (*CCSF*), tobacco company defendants, relying on *Clancy*, sought to disqualify the private attorneys hired by the public entity plaintiffs to assist in the prosecution of a lawsuit. The lawsuit alleged a variety of causes of action, but it did not include any public nuisance abatement cause of action. (*CCSF*, at pp. 1134-1135.) The federal district court distinguished *Clancy* and refused to disqualify the private attorneys. (*CCSF*, at pp. 1135-1136.) "[The private attorneys are] acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed. . . . [¶] The Court also finds that the civil tort nature of this action meaningfully distinguishes it from *Clancy*. This

lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers. [¶] Finally, the case as it stands now will not require the private attorneys to argue about the policy choices or value judgments suggested by defendants regarding the regulation of tobacco. Rather, plaintiffs' attorneys simply will be arguing, as they likely have in many other cases for private sector clients, that a tort has been committed against their clients." (*CCSF*, at p. 1135.)

While the litigation in *CCSF* was not a public nuisance abatement action, and the court distinguished *Clancy* on that ground, the court also distinguished *Clancy* on the ground that the private attorneys would not be controlling the litigation, which would be controlled by the public entities' in-house counsel. Thus, *CCSF* too provides some support for our conclusion that absolute neutrality is not required where private counsel serve in a subordinate role and lack any control over the litigation.

E. Conclusion

*Clancy* itself does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in this litigation, so long as the public entities' in-house counsel retain control over all decision-making. The record before us contains absolutely no evidence that private counsel have ever engaged in any conduct that invaded the sphere of control exercised by the public entities' in-house

counsel.[11] No authority supports barring private counsel from assisting the public entities under a contingent fee arrangement in this litigation. Therefore, the superior court's order is unjustified, and we will direct the court to set it aside.

III. Disposition

Let a writ of mandate issue commanding the superior court to set aside its order granting the companies' motion and to enter a new order denying the motion. The public entities shall recover their costs.

I CONCUR: McADAMS, J.BAMATTRE-MANOUKIAN, J., Concurring.

I concur in the result reached in the majority opinion that the California Supreme Court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*) does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action. I write separately to express my view that the determination of whether a contingency fee agreement between a public entity and private counsel is barred in a public nuisance abatement action is a factual determination that must be made on a case-by-case basis.

Our Supreme Court has instructed that prosecutorial neutrality is required in a public entity's prosecution of a public nuisance abatement action.

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[11] No doubt the companies will seek disqualification of the public entities' private attorneys if they acquire evidence that the private attorneys are improperly exercising control over this action.

(*Clancy, supra*, 39 Cal.3d at pp. 748-749, 218 Cal. Rptr. 24, 705 P.2d 347.) To ensure that a contingency fee agreement is not "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action" (*id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347), I believe the court must review the factual circumstances of each case to determine whether, as a result of the contingency fee agreement, "the prosecutor's *discretionary decision-making* has been placed within the influence or control of an interested party" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 841, 118 Cal.Rptr.2d 725, 44 P.3d 102 (*Hambarian*)) or is subject to "conflicting personal interests" (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 267, 137 Cal.Rptr. 476, 561 P.2d 1164).

As I will explain, my conclusion that a case-by-case factual determination is required derives from a careful review of the decision in *Clancy* and other decisions of the California Supreme Court, as well as decisions of the federal and state courts. I have also carefully considered the important public policy issues addressed in *Clancy* and in the helpful briefs of the parties and the amicus curiae.[1]

I also write separately to recognize the court's inherent power to review contingency fee agreements

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[1] *Amicus* briefs were filed by the American Chemistry Council; the Association of California Water Agencies; the Chamber of Commerce of the United States and the American Tort Reform Association (joint brief); the Civil Justice Association of California; the California State Association of Counties and the League of California Cities (joint brief); and Public Justice, P.C., Healthy Children Organizing Project; and the Western Center for Law and Poverty (joint brief).

(*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 933, 211 Cal.Rptr. 77, 695 P.2d 164), which will allow the trial court to oversee the propriety of the contingency fee agreements in this case throughout the course of the litigation.

A. *The Clancy Decision*

The contingency fee agreement at issue in *Clancy* was between a private attorney, James Clancy, and the City of Corona (City). Included in Clancy's employment contract with the City was a fee agreement providing that "Clancy is to be paid $60 per hour, 'provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against City, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by Attorney hereunder in which City is a successful party if and to the extent that the City does not recover its attorney's fees from the unsuccessful party or parties.'" (*Clancy, supra*, 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.)

After the City adopted a resolution declaring a business selling sexually explicit materials, known as the "Book Store," to be a public nuisance, Clancy, on behalf of the City as its "'special attorney,'" filed a complaint against the Book Store and its owners for abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at pp. 743-744, 218 Cal.Rptr. 24, 705 P.2d 347.) City later amended its complaint to substitute "'City Attorney of Corona'" as Clancy's title in the action. (*Id.* at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The trial court denied the defendants' motion to disqualify Clancy as attorney for the City, and the defen-

dants subsequently sought a writ of prohibition from the California Supreme Court "to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative. . . ." (*Ibid.*) The defendants contended that it was improper for Clancy to have a financial stake in the outcome because an attorney prosecuting a public nuisance action must be neutral.

To determine whether Clancy should be disqualified, the California Supreme Court evaluated "the propriety of a contingent fee agreement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance." (*Clancy, supra*, 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The court began its evaluation by examining the requirement of neutrality for public prosecutors in criminal prosecutions and government attorneys in eminent domain actions. (*Clancy, supra*, 39 Cal.3d at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.) Regarding criminal prosecutions, the *Clancy* court noted that "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional. . . ." (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) The court then determined that "[t]he justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Ibid.*) The "certain civil cases" included eminent domain actions, because the government attorney in an eminent domain action occupies "'a position analogous to a public prosecutor'" and is therefore "'"possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." [Citation.]'" (*Id.* at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.)

The requirement of a neutral prosecuting attorney also extended to public nuisance abatement actions, the *Clancy* court reasoned, because a public nuisance abatement action is similar to an eminent domain action. Both types of actions involve a balancing of the interests of the public and the landowner. (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) "Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Id.* at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

Moreover, the *Clancy* court observed, "[p]ublic nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) "A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney" (*Ibid.*, fn. omitted.)

Having determined that a neutral prosecuting attorney was required in a public nuisance abatement action, the *Clancy* court examined Clancy's contingency fee agreement to evaluate whether prosecutorial neutrality would be maintained in the City's public nuisance action against the Book Store. The court found that Clancy had "an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf

of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748, 218 Cal.Rptr. 24, 705 P.2d 347.) Consequently, the court held that Clancy should be disqualified because his contingency fee agreement was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

The *Clancy* court issued a writ of mandate that, among other things, directed the trial court to issue an order dismissing Clancy as the City's attorney in the pending public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) However, in a footnote the court stated that "on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes." (*Id.* at p. 750, fn. 5, 218 Cal.Rptr. 24, 705 P.2d 347.)

B. *The Test for Prosecutorial Neutrality*

As I have discussed, the *Clancy* court indicated, in holding that Clancy's contingency fee agreement with the City of Corona violated the standard for prosecutorial neutrality, that the standard of neutrality that applies to a government attorney in a public nuisance abatement action is the same standard that applies to a public prosecutor in a criminal action. (*Clancy*, *supra*, 39 Cal.3d at pp. 748-749, 218 Cal.Rptr. 24, 705 P.2d 347.) Therefore, for the purpose of evaluating the propriety of a contingency fee agreement in a public nuisance abatement action, decisions concerning the disqualification of a district attorney's office for a violation of the standard of neutrality are instructive.

The *Clancy* court's analysis relied in part on an earlier California Supreme Court decision, *Greer, supra*, 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164, for the proposition that a government attorney, like a public prosecutor, must be absolutely neutral. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-747, 218 Cal.Rptr. 24, 705 P.2d 347.) In *Greer*, the defendants sought the disqualification of the district attorney on the ground that a conflict of interest existed because the victim's mother was employed in the district attorney's office. (*Greer*, *supra,* 19 Cal.3d at p. 259, 137 Cal.Rptr. 476, 561 P.2d 1164.) Our Supreme Court affirmed the trial court's order disqualifying the district attorney because the prosecutor might have an "emotional stake" in the case that could "disturb his exercise of impartial judgment in pretrial and trial proceedings." (*Id.* at p. 270, 137 Cal.Rptr. 476, 561 P.2d 1164.)

The *Greer* court's analysis of the disqualification issue was based upon the defendant's fundamental due process right not to be deprived of liberty without a fair trial and the prosecutor's obligation "to respect this mandate." (*Greer, supra*, 19 Cal.3d at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164.) "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his [or her] activities, his [or her] duties are conditioned by the fact that he [or she] "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citations.]" (*Ibid.*; *People v. Fierro* (1991) 1 Cal.4th 173, 208, 3 Cal.Rptr.2d 426, 821 P.2d 1302.)

In *Greer*, our Supreme Court also recognized that the requirement of prosecutorial impartiality arose from the prosecutor's discretionary powers. "[I]t is precisely because the prosecutor enjoys such broad discretion that the public he [or she] serves and those he [or she] accuses may justifiably demand that he [or she] perform his [or her] functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer*, *supra*, 19 Cal.3d at pp. 266-267, 137 Cal.Rptr. 476, 561 P.2d 1164.) Thus, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality. In short, the prosecuting attorney '"is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or *by an interested individual*. . . ."' [Citation.]" (*Id.* at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164.)

In *Hambarian*, *supra*, 27 Cal.4th 826, 118 Cal.Rptr.2d 725, 44 P.3d 102, our Supreme Court also addressed the issue of prosecutorial neutrality. The court considered the merits of the defendant's motion to disqualify the district attorney's office on the ground that the district attorney had accepted the services of a forensic accountant who was compensated by the victim, the City of Orange. (*Id.* at p. 829, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Under Penal Code section 1424, a motion to disqualify a prosecutor on the ground of conflict of interest may not be granted unless "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen.Code, § 1424, subd. (a)(1).) The court recognized, as it did in *Greer*, that a public prosecutor is required to "act in an impartial manner"

because he or she has "broad discretion over the entire course of the criminal proceedings. . . ." (*Hambarian*, *supra*, 27 Cal.4th at pp. 839-840, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Accordingly, the *Hambarian* court determined that the proper test for a disqualifying conflict of interest under Penal Code section 1424 is whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party." (*Id.* at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102, fn. omitted.)

Our Supreme Court in *Hambarian* further instructed that a motion for disqualification of a district attorney's office should be reviewed on a case-by-case basis, because "no one factor will compel disqualification in all cases; 'the entire complex of facts' must be reviewed to determine 'whether the conflict makes fair and impartial treatment of the defendant unlikely.' [Citation.]" (*Hambarian*, *supra*, 27 Cal.4th at p. 834, 118 Cal.Rptr.2d 725, 44 P.3d 102; *People v. Eubanks* (1996) 14 Cal.4th 580, 599, 59 Cal.Rptr.2d 200, 927 P.2d 310.) Therefore, because the evidence showed that the forensic consultant had no control over "critical prosecutorial decisions," the *Hambarian* court determined that the motion to disqualify the district attorney's office was properly denied. (*Id.* at pp. 839, 842, 118 Cal.Rptr.2d 725, 44 P.3d 102.) Citing *Clancy*, the court explained that "recusal [of the district attorney] is not necessary to ensure [the defendant's] right to fair treatment during all portions of the criminal proceedings. [Citation.]" (*Hambarian, supra*, 27 Cal.4th at p. 840, 118 Cal.Rptr.2d 725, 44 P.3d 102.)

Review of these California Supreme Court cases clarifies that a public prosecutor may be disqualified if a case-by-case review of the factual circumstances

surrounding the claimed conflict of interest indicates that "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party" (*Hambarian, supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to "conflicting personal interests" (*Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164). Thus, the test for a disqualifying conflict of interest may be stated as follows: where the factual circumstances in a case indicate that the public prosecutor's discretionary decisionmaking is not likely to be impartial, the standard of neutrality has been violated and the prosecutor may be disqualified.

The test for a disqualifying conflict of interest established by the California Supreme Court in *Hambarian* and *Greer* is equally applicable in civil actions, because a government lawyer in a civil action occupies "a position analogous to a public prosecutor [and] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' [Citation.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545.) Thus, "'[a] government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he [or she] should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results.' [Citation]." (*Ibid.*)

The California Supreme Court in *Clancy* applied the test for a disqualifying conflict of interest in a civil action when the court found that a contingency fee agreement doubling the fees of a private attorney who succeeded in prosecuting a public nuisance abatement action created a conflict of interest, due to

the private attorney's personal financial interest in the litigation. (*Clancy, supra*, 39 Cal.3d at pp. 749-750, 218 Cal.Rptr. 24, 705 P.2d 347.) The private attorney was apparently able, under his contingency fee agreement, to exercise the discretionary decisionmaking authority of a government attorney in litigating the public nuisance action, with the sole exception that the city council would decide whether to bring an action under the public nuisance ordinance. (*Id.* at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347.) Therefore, the factual circumstances in *Clancy* demonstrated that as a result of the contingency fee agreement, the private attorney was not likely to be impartial in his discretionary decisionmaking. The *Clancy* court therefore determined that the contingency fee agreement in that case was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

C. *Federal and State Court Decisions*

Federal and state courts have also grappled with the issue of the propriety of a contingency fee agreement between a public entity and private counsel. Several decisions support a general rule that a contingency fee agreement is permitted, even though private counsel retains a financial stake in the outcome, where the agreement provides that government attorneys will maintain control over the discretionary decisionmaking throughout the litigation.

In Ohio, the federal court recently considered the Sherwin-Williams Company's challenge to the contingency fee agreements between three Ohio cities and private counsel in lead paint litigation. (*Sherwin-Williams Co. v. City of Columbus* (S.D. Ohio, July 18,

2007, No. C2-06-829, 2007 WL 2079774, 2007 U.S. Dist. Lexis 51945 (*Sherwin-Williams*).) The court's original ruling on Sherwin-Williams's motion for injunctive relief directed the cities to amend their contingency fee agreements because the court found that "the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (*Id.*, 2007 WL 2079774 at p. *1, 2007 U.S. Dist. Lexis 51945 at pp. **3-4.)

In a subsequent ruling, the federal court in *Sherwin-Williams* approved the two contingency fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Sherwin-Williams*, *supra*, 2007 WL 2079774, p. *1, 2007 U.S. Dist. Lexis 51945, p. *6.) However, the court found that the third contingency fee agreement was not adequately amended because the agreement provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.*, 2007 WL 2079774 at p. *3, 2007 U.S. Dist. Lexis 51945 at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingency fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

In a public nuisance abatement action in California, the federal court considered the defendants' motion to disqualify private counsel on the ground that their contingency fee agreement violated the government attorney's duty of neutrality. (*City of Grass Valley v. Newmont Mining Corp.* (E.D. Cal., Nov. 20, 2007, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238, 2007 U.S. Dist. Lexis 89187.) Relying on *Clancy,* the defendants argued that a public entity could not hire private counsel on a contingency fee basis to litigate a public nuisance abatement action. The federal court rejected this argument and denied the disqualification motion, finding that defendants had not "countered Plaintiff's showing that the City Attorney for the City of Grass Valley is acting as co-counsel in this action and the City retains 'ultimate decision-making authority in the case.' [Citation.]" (*Grass v. Newmont Mining Corp., supra,* 2007 WL 4166238, p. *1, U.S. Dist. Lexis 89187, p. *3.)

In tort litigation involving a state's claim against the tobacco industry for recovery of the health care costs of citizens with tobacco-related illnesses, the defendants also relied on *Clancy* to challenge the legality of a contingency fee agreement between a public entity and its private counsel. In *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230 (*Glendening*), the Maryland Court of Appeals rejected the defendants' challenge to the contingency fee agreement between the Attorney General of Maryland and the private law firm that represented the State of Maryland in tort litigation against the tobacco industry. The contingency fee agreement expressly provided that the "'Attorney General shall have the authority to control all aspects of [outside counsel's] handling of the litigation . . . [and] such authority shall be final, sole and

unreviewable.' [Citation.]" (*Id.* at p. 663, 709 A.2d 1230.)

After determining that state law authorized the Attorney General to enter into contingency fee agreements, the *Glendening* court addressed the defendants' claim that the contingency fee agreement violated due process and public policy under the principle, as illustrated in *Clancy*, that a public officer should not participate in a matter in which he or she has a personal or pecuniary interest. (*Glendening*, *supra,* 349 Md. at p. 684, 709 A.2d 1230.) The Maryland court determined that *Clancy* was distinguishable because the case before it did not directly implicate any constitutional or criminal violations. "Equally important," the court also found, was the absence in *Clancy* "of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable." (*Id.* at p. 686, 709 A.2d 1230.) The court therefore held that the Maryland Attorney General's oversight prevented outside counsel's financial interest in the outcome of the tobacco litigation from violating prosecutorial neutrality. (*Id.* at p. 688, 709 A.2d 1230.)

The federal court similarly determined in *City and County of San Francisco v. Philip Morris, Inc.* (N.D.Cal.1997) 957 F.Supp. 1130 (*Philip Morris*) that a contingency fee agreement between several public entities and the private law firm of Lieff, Cabraser, Heinmann & Bernstein in tobacco-related tort litigation was not barred under *Clancy*. The court stated, "While the contingent fee arrangement here clearly gives Lieff, Cabraser a stake in the litigation, the Court finds that this case is sufficiently distinguisha-

ble from *Clancy* to allow for the government's retention of private counsel. First, as plaintiffs explain, Lieff, Cabraser is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between Lieff, Cabraser and the plaintiffs." (*Id.* at p. 1135.) The court in *Philip Morris* also found that the case before it was a civil tort action, which further distinguished it from *Clancy*. (*Ibid.*)

Thus, these federal and state courts have ruled that the propriety of a contingency fee agreement between a public entity and private counsel must be evaluated on a case-by-case basis, by examining the terms of the agreement to determine whether prosecutorial neutrality has been preserved by the government attorneys retaining control over discretionary decisionmaking, such as settlement and dismissal, and by considering the factual circumstances of each case.

D. *Petitioners' Contingency Fee Agreements*

Based on my review of California Supreme Court authority and the decisions of federal and state courts, I believe that the court must evaluate the propriety of a contingency fee agreement between a public entity and private counsel in a public nuisance abatement action on a case-by-case basis. The factual circumstances of each case and the terms of each contingency fee agreement should be reviewed to determine whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence

or control of an interested party" (*Hambarian*, *supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to "conflicting personal interests" (*Greer*, *supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164). If so, the contingency fee agreements must be barred because the agreements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d. at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

Applying this test, I agree with the majority that, based on the record in this original proceeding, the current contingency fee agreements are not antithetical to the standard of neutrality that a government attorney must meet in a public nuisance abatement action. Here, the terms of the contingency fee agreements expressly provide that the government attorneys retain "complete control" of the litigation, including, in some instances, "all decision making authority and responsibility." It is therefore reasonable to assume at this point in the litigation that the government attorneys intend to retain control over all discretionary decisionmaking. Moreover, the factual circumstances do not include a pending or anticipated criminal prosecution arising from the alleged public nuisance, and therefore the bar on contingency fee agreements in criminal prosecutions (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347) is not implicated. For these reasons, I believe that a contingency fee agreement is permissible in the present public nuisance abatement action and that it is not likely, under the current terms of the petitioners' contingency fee agreements, that the requirement of prosecutorial neutrality in public nuisance abatement actions will be violated.

In reaching this conclusion, I recognize the trial court's concern that "as a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel."

However, as I have stated, the California Supreme Court has instructed that the decisions over which the government attorneys must retain control in a public nuisance abatement action are the discretionary decisions. In the public prosecutor context, our Supreme Court has observed that the prosecutor "has broad discretion over the entire course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian, supra*, 27 Cal.4th at p. 840, 118 Cal.Rptr.2d 725, 44 P.3d 102.) In *Clancy*, the court stated that "'[t]he prosecutor's discretionary functions are not confined to the period before the filing of charges . . . A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his [or her] zeal, as reflected in his [or her] tactics at trial, will be born of objective and impartial consideration of each individual case.'" (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347.) With respect

to eminent domain actions, the court has emphasized that "'[a] government lawyer in a civil action . . . should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results." (*City of Los Angeles v. Decker, supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

Thus, as emphasized in *Clancy* and *Decker*, it is the consequences of discretionary decisionmaking, rather than the details of each decision, that are significant in determining whether the standard of neutrality has been met in the litigation of a public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347; *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871, 135 Cal.Rptr. 647, 558 P.2d 545.) Where zealous representation of the government by private counsel has a result that is just and consistent with the public interest, and the conduct of the litigation is "born of objective and impartial consideration," the trial court may reasonably determine that the government attorneys have maintained control of the discretionary decisionmaking and therefore prosecutorial neutrality has been preserved.

The trial court also has an important oversight role in ensuring prosecutorial neutrality, because the court has the "inherent power to review attorney fee contracts and to prevent overreaching and unfairness." (*Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d at p. 933, 211 Cal.Rptr. 77, 695 P.2d 164.) Thus, as a federal district court has noted, "'"[A]n attorney's right to contract for a contingent fee is not completely beyond judicial control." A lawyer is first an officer of the court, and as such his [or her] commercial contractual rights must yield to his

[or her] duty.' [Citation.]" (*Sarei v. Rio Tinto PLC* (C.D.Cal.2002) 221 F.Supp.2d 1116, 1168; see also *State of North Dakota v. Hagerty* (1998) 1998 N.D. 122, 580 N.W.2d 139, 148 [court's inherent power to supervise attorney fees].) Thus, the propriety of a contingency fee agreement may be raised at any time in the litigation, whether by a motion for disqualification or other procedural means such as the "motion to bar payment of contingent fees to private attorneys" that was filed in the case at bar.

Finally, because the decisions of the California Supreme Court, the federal courts and other state courts support my view that the propriety of a contingency fee agreement in a public nuisance abatement action must be determined on a case-by-case basis, I do not believe that the language of the contingency fee agreement is the only factor to be considered. Other significant factors must also be considered. For example, there may be public nuisance abatement actions in which parallel criminal prosecutions are pending or anticipated, because as the *Clancy* court noted, "Public nuisance abatement actions . . . often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen.Code, § 372.)" (*Clancy, supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted.) Another important factor that must be considered is the conduct of plaintiffs' counsel, which may reveal whether the government attorneys' discretionary decisionmaking has been placed within the influence or control of an interested party (*Hambarian, supra*, 27 Cal.4th at p. 841, 118 Cal.Rptr.2d 725, 44 P.3d 102), or is subject to conflicting personal interests

(*Greer, supra*, 19 Cal.3d at p. 267, 137 Cal.Rptr. 476, 561 P.2d 1164).

Thus, the propriety of a contingency fee agreement in a public nuisance action must be evaluated by careful consideration of the many important factors in each case, including the factual circumstances, the terms of the contingency fee agreement, and the conduct of plaintiff's counsel, because, as the *Clancy* court stated, "The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Clancy, supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.)

Therefore, based on my review of the factual circumstances in this case and the terms of the contingency fee agreements, I would conclude that the California Supreme Court's decision in *Clancy, supra*, 39 Cal.3d 740, 218 Cal.Rptr. 24, 705 P.2d 347 does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action.

I recognize, however, that the issue of the circumstances under which public entities may properly retain private counsel under contingency fee agreements to assist in the litigation of public nuisance abatement actions is of great public significance. For this reason, I would respectfully invite the California Supreme Court to review this issue and to provide guidance to the courts and public entities in this important and developing area of the law.

# APPENDIX C

SUPERIOR COURT OF CALIFORNIA.
Santa Clara County

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No. 1-00-CV-788657.

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COUNTY OF SANTA CLARA, *et al.*,
*Plaintiffs*,

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,
*Defendants*.

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April 4, 2007.

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## Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys

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Hon. Jack Komar, Judge of the Superior Court.

The motion by Defendants Atlantic Richfield Company; American Cyanamid Company; ConAgra Grocery Products Company; E.I. du Pont de Nemours and Company; Millennium Inorganic Chemicals Inc.; NL Industries, Inc.; and The Sherwin-Williams Company for an order to bar payment of contingent fees to private attorneys came on for hearing before the Honorable Jack Komar on April 3, 2007, at 9:00 a.m. in Department 17C. The matter having been submitted, the Court orders as follows:

I. *Defendants' Requests for Judicial Notice*

A. Defendants' request for judicial notice of Plaintiffs' agreements with outside counsel (Exs. A - I) is DENIED. While judicial notice of the agreements is not proper, the Court has considered the agreements as evidence in connection with Defendants' motion. Plaintiffs do not contest the authenticity of the agreements and have provided identical copies of some of the agreements in opposition.

B. Defendants' request for judicial notice of a minute order from *People v. Atlantic Richfield Co., et al.*, Orange County Superior Court Case No. 804030 (Ex. J), is GRANTED as to the existence of the order.

C. Defendants' request for judicial notice of the size of the budgets of the plaintiff entities (Reply Exs. A - I) is DENIED. The amount of a specific entity's budget is not a proper subject of judicial notice. An entity's projections and expectations regarding its budget may change during the course of the fiscal year at issue. Further, the sizes of the budgets are not relevant to the issues in Defendants' motion.

II. *Defendants' Motion*

Defendants seek an order precluding Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation. Defendants contend the government may not retain a private attorney on a contingent fee basis to litigate a public nuisance claim.

Plaintiffs contend there is no absolute bar to retaining outside counsel on a contingent fee basis to litigate a public nuisance claim and, given the circumstances under which outside counsel was

retained in this case, disqualification of outside counsel is not warranted.

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 ("*Clancy*"), the California Supreme Court evaluated[d] the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance." (*Clancy*, 39 Cal.3d at 743.) The California Supreme Court explained that "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Id.*, at 750.)

*Clancy* is applicable to the instant case. Plaintiffs fail to persuasively distinguish *Clancy*, or otherwise persuasively articulate why their fee arrangements with outside counsel are proper. Plaintiffs' main argument is that the government attorneys continue to retain and/or exercise decision-making authority and control over the litigation in this case.[1] The fact

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[1] Some of the agreements between Plaintiffs and Cotchett, Pitre & McCarthy (formerly Cotchett, Pitre & Simon) clearly state outside counsel "is given absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." However, many of the Plaintiffs revised or are in the process of revising this language in their agreements with the Cotchett firm. Further, the declarations submitted in opposition to Defendants' motion uniformly state that the government attorneys have retained decision-making authority and responsibility in the case, notwithstanding the hiring of outside counsel.

remains, however, that outside counsel (*i.e.*, Thornton & Naumes, Motley Rice LLC, and Mary Alexander and Associates for the City and County of San Francisco, and Cotchett, Pitre & McCarthy for most of the other public entities) are co-counsel in this case. They are performing work as attorneys for the plaintiff government entities, and consequently they are subject to the standard of neutrality articulated in *Clancy*. Oversight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality.

Moreover, as a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel. Plaintiffs in their opposition characterize outside counsel as "collaborators." (*See* Pls.' Mem. Opp. Motion, at 8:21-22.) Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Plaintiffs make two additional arguments in their opposition. Plaintiffs contend public policy should preclude disqualification in this case, because the government entities and lawyers lack the resources and specific expertise necessary to prosecute this action. The standard of neutrality should apply, however, regardless of the wealth of either the government lawyer or the defendant. (*See City & County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1136 fn. 3 ["The Court wishes to make clear that it does not base this ruling on plaintiffs' argument that, as a matter of public policy, a contingent fee arrangement is necessary in this case to make it feasible for the financially strapped government entities to match resources with the wealthy tobacco defendants. The Court does not find this argument convincing in light of the concerns expressed in *Clancy*."].)

Plaintiffs also contend Defendants' motion is premature, unless and until Defendants are found liable, the Court determines the appropriate form and scope of the abatement remedy, and the Court determines the appropriate amount of fees in this case. This action may be resolved prior to such determinations, however, *e.g.*, by way of settlement or by way of other dispositive motion. If Defendants are entitled to neutral prosecution by government attorneys who are not operating under a contingent fee arrangement, then they are so entitled throughout the prosecution of this case.

Accordingly, Defendants' motion for an order precluding Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation is GRANTED. Plaintiffs shall have 30 days to

file with the court new fee agreements in accordance with this order. In lieu of filing the actual agreements, Plaintiffs may provide declarations detailing the fee arrangements with outside counsel.

Dated: April 4, 2007

/s/ Jack Komar
Hon. Jack Komar
Judge of the Superior Court